

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

PHILLIP MARTINEZ,

Plaintiff,

v.

BOYD GAMING CORPORATION, *et al.*,

Defendants.

Case No. 2:23-cv-01775-GMN-NJK

ORDER

Plaintiff is proceeding in this action *pro se* and has requested authority pursuant to 28 U.S.C. § 1915 to proceed *in forma pauperis*. Docket No. 2. Pending before the Court is Plaintiff's complaint, Docket No. 2-2, which must be screened pursuant to § 1915(e).

I. In Forma Pauperis Application

Plaintiff filed the affidavit required by § 1915(a). Docket No. 2. Plaintiff has shown an inability to prepay fees and costs or give security for them. Accordingly, the request to proceed *in forma pauperis* will be granted pursuant to 28 U.S.C. § 1915(a). The Clerk's Office is further **INSTRUCTED** to file the complaint on the docket. The Court will now review Plaintiff's complaint.

II. Screening the Complaint

Upon granting an application to proceed *in forma pauperis*, courts additionally screen the complaint pursuant to § 1915(e). Federal courts are given the authority to dismiss a case if the action is legally "frivolous or malicious," fails to state a claim upon which relief may be granted, or seeks monetary relief from a defendant who is immune from such relief. 28 U.S.C. § 1915(e)(2). When a court dismisses a complaint under § 1915, the plaintiff should be given leave to amend the complaint with directions as to curing its deficiencies, unless it is clear from the face of the complaint that the deficiencies could not be cured by amendment. *See Cato v. United States*, 70 F.3d 1103, 1106 (9th Cir. 1995).

1 Rule 12(b)(6) of the Federal Rules of Civil Procedure provides for dismissal of a complaint
2 for failure to state a claim upon which relief can be granted. Review under Rule 12(b)(6) is
3 essentially a ruling on a question of law. *See Chappel v. Lab. Corp. of Am.*, 232 F.3d 719, 723
4 (9th Cir. 2000). A properly pled complaint must provide a short and plain statement of the claim
5 showing that the pleader is entitled to relief. Fed.R.Civ.P. 8(a)(2); *Bell Atlantic Corp. v. Twombly*,
6 550 U.S. 544, 555 (2007). Although Rule 8 does not require detailed factual allegations, it
7 demands “more than labels and conclusions” or a “formulaic recitation of the elements of a cause
8 of action.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Papasan v. Allain*, 478 U.S. 265,
9 286 (1986)). The court must accept as true all well-pled factual allegations contained in the
10 complaint, but the same requirement does not apply to legal conclusions. *Iqbal*, 556 U.S. at 679.
11 Mere recitals of the elements of a cause of action, supported only by conclusory allegations, do
12 not suffice. *Id.* at 678. Secondly, where the claims in the complaint have not crossed the line from
13 conceivable to plausible, the complaint should be dismissed. *Twombly*, 550 U.S. at 570.
14 Allegations of a *pro se* complaint are held to less stringent standards than formal pleadings drafted
15 by lawyers. *Hebbe v. Pliler*, 627 F.3d 338, 342 & n.7 (9th Cir. 2010) (finding that liberal
16 construction of *pro se* pleadings is required after *Twombly* and *Iqbal*).

17 In addition, the Court has a duty to ensure that it has subject matter jurisdiction over the
18 dispute before it, an issue it may raise at any time during the proceedings. *See, e.g.*, Fed. R. Civ.
19 P. 12(h)(3). Federal courts are courts of limited jurisdiction and possess only that power
20 authorized by the Constitution and statute. *See Rasul v. Bush*, 542 U.S. 466, 489 (2004). “A
21 federal court is presumed to lack jurisdiction in a particular case unless the contrary affirmatively
22 appears.” *Stock West, Inc. v. Confederated Tribes of the Colville Reservation*, 873 F.2d 1221,
23 1225 (9th Cir. 1989). “The party asserting federal jurisdiction bears the burden of proving that the
24 case is properly in federal court.” *McCauley v. Ford Motor Co.*, 264 F.3d 952, 957 (9th Cir. 2001)
25 (citing *McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178, 189 (1936)).

26 Before filing suit, an employment plaintiff must administratively exhaust his remedies with
27 the United States Equal Employment Opportunity Commission or the Nevada Equal Rights
28 Commission. *See, e.g., You v. Longs Drugs Stores Cal., LLC*, 937 F. Supp. 2d 1237, 1248-49 (D.

Haw. 2013). The plaintiff must attach to his complaint the right to sue letter issued in relation to those administrative proceedings. *See, e.g., Delaney v. Lynwood Unified School Dist.*, 2008 WL 11338726, at *3 (C.D. Cal. Apr. 7, 2008). Federal subject matter jurisdiction is lacking when the plaintiff fails to first exhaust his administrative remedies. *Lyons v. England*, 307 F.3d 1092, 1103 (9th Cir. 2002).

In this case, Plaintiff alleges that he filed a complaint with the United States Equal Employment Opportunity Commission. Docket No. 2-2 at 17. Plaintiff further alleges, however, that the case is still open and that Defendant Boyd Gaming “has not filed a Position Statement in the EEOC case.” *See id.* Thus, Plaintiff has not demonstrated that he has fully exhausted his administrative remedies.

In light of the above, Plaintiff’s complaint is **DISMISSED** with leave to amend. If Plaintiff can cure the deficiencies identified above, he must file an amended complaint by December 18, 2023.

III. Conclusion

Accordingly, **IT IS ORDERED** that:

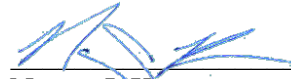
1. Plaintiff’s request to proceed *in forma pauperis* is **GRANTED**. Plaintiff shall not be required to pay the filing fee. Plaintiff is permitted to maintain this action to conclusion without the necessity of prepayment of any additional fees or costs or the giving of a security therefor. This order granting leave to proceed *in forma pauperis* shall not extend to the issuance and/or service of subpoenas at government expense.
2. The Clerk’s Office is **INSTRUCTED** to file Plaintiff’s complaint on the docket.
3. The complaint is **DISMISSED** with leave to amend. Plaintiff will have until **December 18, 2023**, to file an amended complaint, if the noted deficiencies can be corrected. If Plaintiff chooses to amend the complaint, Plaintiff is informed that the Court cannot refer to a prior pleading (i.e., the original complaint) in order to make the amended complaint complete. This is because, as a general rule, an amended complaint supersedes the original complaint. Local Rule 15-1(a) requires that an amended complaint be complete in itself without reference to any prior pleading. Once a plaintiff

1 files an amended complaint, the original complaint no longer serves any function in the
2 case. Therefore, in an amended complaint, as in an original complaint, each claim and
3 the involvement of each Defendant must be sufficiently alleged.

4 **4. Failure to comply with this order will result in the recommended dismissal of this**
5 **case.**

6 IT IS SO ORDERED.

7 Dated: November 20, 2023

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10 Nancy J. Koppe
11 United States Magistrate Judge
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